IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 1622/2011
Date Heard: 8 August 2012
Date Delivered: 31 January 2013
NOT/REPORTABLE

In the matter between:

TATRIM CC Plaintiff

and

SPENMAC (PTY) LTD Defendant

JUDGMENT

GOOSEN, J:

[1] This is an action in which the plaintiff seeks cancellation of an agreement of sale concluded between the parties in respect of an immoveable property, and payment of the sum of R788,157.89 comprising the deposit paid and an amount in respect of damages. The factual background is essentially common cause between the parties. What is in issue is the nature and effect of certain alleged misrepresentations made by the defendant to the plaintiff.

[2] The property which is the subject matter of the dispute consists of section 1 of a sectional title scheme known as Park Towers Sectional Title Scheme no. 55150/1984. The scheme comprises a multi-storey building with residential sections erected above a ground floor retail commercial centre. It is common cause that the sectional title scheme had, at the time of the sale, consisted of only two sections,

namely section 1 consisting of the ground floor and first floor retail and commercial complex and section 2 consisting of the multi-storey residential component. The defendant was at the time the owner of section 1 whereas section 2 was owned by another party. A central issue in dispute relates to the subdivision of section 2. Although at trial it was common cause that section 2 had, as a matter of fact, been subdivided into 110 residential sections prior to the sale, the parties throughout referred to section 2 as the residential component and I shall, for convenience, continue to do so.

[3] The circumstances giving rise to the conclusion of the agreement of sale are the following. During the course of 2010 the property was offered for sale. The plaintiff, represented by Thompson, had made enquiries and had submitted an offer to purchase. The offer was rejected. Thereafter, on 30 September 2010 the defendant offered the property for sale by public auction. The plaintiff entered a bid at the auction but its bid was not accepted. Immediately after the auction the plaintiff made a further offer increasing the price offered to R10,5 million. On 8 October 2010 the plaintiff and defendant entered into an agreement in terms of which the plaintiff agreed to pay the sum of R10,500,000.00 for the property. In terms of the written agreement of sale concluded between the parties it was agreed that the plaintiff would pay a deposit of 5% of the purchase price and that the plaintiff (as purchaser) would be liable for and pay the sum of R300,000.00 including VAT in respect of the auctioneer's commission.

[4] The plaintiff alleges that the defendant's representative, Spendley, made certain representations which he knew to be false, and that these representations

induced the plaintiff into entering into the agreement. The plaintiff therefore seeks cancelation of the agreement. The defendant denies that it made any false representations at all. It too pleads cancellation of the agreement, by reason of plaintiff's failure to effect payment and claims retention of the deposit as unliquidated damages.

[5] The misrepresentation upon which the plaintiff relies is pleaded in the following terms. It is alleged that Spendley expressly represented partly orally and partly in writing, that the remainder of the scheme consisted of only one unit, namely section 2, and that in terms of rule 27 of the Scheme Rules, it would not be possible for the owner of section 2 to subdivide the section without the consent of the owner of section 1. It is alleged that the written representation is contained in a brochure prepared and distributed by the auctioneers on behalf of the defendant. According to the brochure the scheme consisted of only two sections. The plaintiff further alleges that the representations (both oral and written) were false in that (a) during October 2007 the defendant had by resolution of the Trustees of the Body Corporate granted permission to the then owners of section 2, Southern Palace Investments (Pty) Limited, to subdivide the section into 110 units, and (b) section 2 had in fact been subdivided into 110 units which subdivision was registered on 2 July 2010. Accordingly, so it was alleged, the owner of section 1 did not enjoy the alleged right of *veto* contained in Rule 27 of the Scheme Rules.

[6] Rule 27 of the Scheme Rules provides as follows:

> "No instrument signed on behalf of the Body Corporate shall be valid and binding unless it is signed by at least two trustees whereof one shall be a nominee of the owner or owners from time to time of section 1 (or any subdivisions thereof) of the Scheme."

[7] The parties throughout referred to this as a right of *veto* which vests in the owner of section 1. Although it was suggested to the plaintiff's representative in cross-examination that the Rule did not in fact convey a right of *veto* in the light of the provisions of the Sectional Titles Act, nothing significant turns on this. It was common cause that Rule 27 conferred upon the owner of section 1 an effective right of refusal in respect of the subdivision of section 2. The essential issue between the parties was whether it had been represented to the plaintiff that such right was extant or not. I shall for this reason continue to refer to the so-called right of *veto* for the purpose of this judgment.

[8] In the alternative to its reliance on the alleged fraudulent misrepresentations, the plaintiff alleged that at all relevant times it was the continuing common intention of the parties that section1 be sold together with the right of *veto* to prevent any subdivision of section 2. At the time of the conclusion of the agreement it was, or should reasonably have been known to the defendant, that it had previously granted its consent to the subdivision of section 2 and that thereby the right of *veto* had been rendered nugatory. In these circumstances, so it was alleged, the defendant's representative was under a duty to speak and the failure to do so induced in the mind of the plaintiff a reasonable but mistaken belief that it purchased section 1 together with the right of *veto*. There was accordingly no consensus between the parties entitling the plaintiff to avoid the agreement.

[9] As indicated it was common cause that in October 2007 the defendant had authorised the then owners of section 2, Southern Palace Investments, to subdivide

the section into 110 units and that section 2 had, as a matter of fact, been subdivided into 110 units by its present owner. What was in dispute was whether defendant's representative had made any representation at all in respect of the subdivision of section 2 and what effect, if any, should attach to the defendant's failure to disclose given the defendant's claim that Spendley had no knowledge of the fact of subdivision and no recollection of the October 2007 approval of subdivision given by the defendant to Southern Palace Investments.

[10] Joseph Thompson, the sole member of the plaintiff, testified that in early 2010 the plaintiff wanted to acquire commercial property for investment purposes. At the time he dealt with a Rodney Venter who was a property agent. He was introduced to the Park Towers property and informed that it comprised of two sections. At the time he was given a set of the Scheme Rules as well as copies of several leases. After taking advice from certain of his associates he decided that he was not interested in purchasing the property. According to him however, he was then contacted by Spendley, a director of the defendant, at some stage later in the year. When he informed Spendley that he was concerned about the subdivision of section 2 (ie. the residential section), Spendley allegedly informed him that he need not be concerned since the owner of section 2 could not subdivide without the consent of the owner of section 1. He could accordingly *veto* any subdivision that the owner of section 2 wished to make. Thompson stated that having satisfied himself with regard to the rental returns he could earn and having spoken to the financial director of the owner of section 2 regarding the plans for the building he then, on 12 August 2010, submitted an offer which included a suspensive condition relating to a due diligence assessment. The relevant clause in the offer provides as follows:

"6. SUSPENSIVE CONDITIONS

6.1 Due diligence and resolution by purchaser to proceed:

6.1.1 The seller acknowledges that:

6.1.1.1 The purchaser is purchasing the property for investment purposes;

6.1.1.2 The future profitability of the investment in respect of the property is dependant, *inter alia*, on the current leases applicable in respect of the property, the future let ability of the property, the size of the property, the condition of the property, the operational and other costs associated with ownership of the property and the rental enterprise, the financial position of the Park Towers Body Corporate and other factors;

6.1.1.3 In order to assess the viability of the investment in respect of the property, the purchaser needs to investigate the factors referred to in clause 6.1.1.2 and satisfy itself as to the future profitability of the investment in respect of the property.

6.1.2 The sale of the property by the seller to the purchaser, on the terms and conditions as contained in this agreement, is therefore subject to the suspensive condition that the purchaser, having had an opportsectiony to carry out a due diligence and investigate the future profitability of the property and the rental enterprise, resolves, in writing, within 30 (THIRTY) days of signature hereof, to proceed to purchase the property subject to the further conditions hereto.

6.1.3 The seller shall cooperate and allow the purchaser and/or its servants, agents or contractors (building, roofing, electrical, plumbing and the like) reasonable access to the property for the purposes of inspecting and investigating the condition of the property. In addition, the seller undertakes to disclose all or any documentation and/or information in the seller's possession within the seller's knowledge pertaining to the property and the rental enterprise, including, without restricting the generality of the aforegoing, any plans relating to the property, the leases, the costs and expenses relating to the property and the rental enterprise, annual audited financial statements of Park Towers Body Corporate and the municipal rates, taxes and consumption charges."

[11] The offer to purchase was in the sum of R10,5 million of which R3 million was payable in cash and the balance of R7,5 million to be secured by way of mortgage loan finance for which provision was made in the offer. This offer was however, not accepted. The property was then placed on auction. The defendant caused a brochure to be published advertising the property for sale at the auction. At the

auction the plaintiff made a bid of R9 million which was also not accepted. Following the auction the plaintiff and defendant entered into further negotiations and arising from these an agreement was concluded.

[12] The deed of sale records that the property was purchased as a rental enterprise and as a going concern. The purchase price of R10.5 million was to be paid as follows:

> "3.1 A deposit of 5% (FIVE PERCENT) of the purchase price to the auctioneer by the purchaser immediately on the fall of the hammer, which deposit may be furnished by the purchaser to the auctioneer in the form of a deposit guarantee, which amount the purchaser hereby authorises the auctioneer to pay over to the seller's attorneys;
>
> 3.2 The balance of the purchase price shall be paid in cash and secured, to the satisfaction of the seller's attorneys, by written guarantee from a registered financial institution, payable free of exchange, against registration of transfer of the property into the purchaser's name. The purchaser may elect to secure the balance of the purchase price by payment in cash to the seller's attorneys, who shall hold same in trust, pending registration of transfer into the name of the purchaser, the aforesaid guarantee shall be presented and/or cash shall be payable by the purchaser to the seller's attorneys within 45 (FORTY-FIVE) days after written request therefore by the seller or the seller's attorneys."

[13] The deed of sale further includes a clause in which the purchaser acknowledges that the property is subject to the rules and regulations of the Body Corporate which has been established in terms of the sectional title scheme and that the purchaser has read and familiarised himself with such rules and regulations. It further contains a clause that specifies that the conditions of sale incorporated in the deed of sale constitute the whole agreement between the parties as to the subject matter of the sale and that no agreement, representation or warranty between the parties other than those set out in the deed of sale are binding on the parties. The deed of sale does not contain any clause relating to a due diligence exercise.

[14] Thompson stated in his evidence that the plaintiff intended to finance the balance of the purchase price and to this end had approached various banking institutions for loan finance, which was approved. The conveyancing documents were prepared by Attorney Tracy Watson. According to Thompson the difficulty emerged when he was requested to sign the conveyancing documents in order to effect transfer of the property into the plaintiff's name. Having signed the documents he was informed by Attorney Watson that it had been discovered that section 2 had in fact been subdivided into 110 separate sections, apparently in July 2010, and that the defendant's representative was not aware as to how this could have occurred. This disclosure resulted in an exchange of correspondence between Thompson on behalf of the plaintiff and Attorney Watson, to which I will refer in more detail hereunder, the upshot of which was that the plaintiff indicated that it was not proceeding with the agreement and that it sought to resile from the agreement.

[15] The plaintiff also led the evidence of Venter. His evidence as to the interactions between Thompson and Spendley is of little assistance. He could not recall much of the detail of conversations he had had with Spendley and accordingly could cast no light upon the nature of the representations allegedly made. He did however confirm that the plaintiff was concerned about the potential of subdivision of section 2 and that he was assured in this regard by the terms of the Rules of the Scheme to which he had been referred.

[16] Spendley, on behalf of the defendant, testified that in early 2010 Thompson had contacted him in response to an advertisement regarding the property to ask him for information about it. As a result of this he dropped off certain documents in

respect of tenants and the costings associated with the building, at Thompson's office. On this occasion he had no discussion with Thompson regarding the property. Later that year, in July, contrary to Thompson's evidence that he had contacted Thompson, he said that Thompson telephoned him indicating that the property had been introduced to him by an agent, Roger Venter. At that time Thompson enquired whether the property that was being offered was still the same property and whether it comprised the same deal. Spendley confirmed that it was and further explained to Thompson why he considered it to be a good bargain. In this regard he explained that all the tenancies were secured, that the property was 100% let and that the income stream was good. He also indicated that the rules favoured the owner of section 1. This, he said, related to the fact that in terms of the Rules, the participation quota payable by section 1 was less than that payable by section 2. Spendley testified that he had received this telephone call when he was at the Spar Supermarket and that there was no discussion about the subdivision of section 2. Thereafter, Spendley said, he had no further contact with Thompson directly. Spendley accordingly denied that he had at any time represented to Thompson that the owner of section 1 enjoyed a *veto* right in respect of the subdivision of section 2. He also denied that Thompson had brought to his attention any concern about the subdivision and therefore ownership of section 2.

[17] Spendley testified further that during August 2010 the plaintiff submitted a written offer on the property. This offer was presented to him by Roger Venter. The offer was immediately rejected because it contained unacceptable suspensive conditions relating to the property. Spendley's evidence was that he was not aware of the fact that section 2 had been subdivided and that he only became aware after

the sale had been concluded and when Attorney Watson established that section 2 had been so subdivided. Upon enquires being made as to how this had occurred he was made aware of the fact that the defendant, represented by himself, had granted approval in October 2007 to the erstwhile owners of section 2, to subdivide that section. He explained that the previous owners, Southern Palace Investments (Pty) Limited, had proposed the subdivision for purposes of selling-off residential units as luxury apartments. The defendant had, on the strength of this, granted its consent to the subdivision. Southern Palace Investments, however, was thereafter liquidated in 2008 and section 2 was sold to its present owners by public auction on the 10th of December 2008. It was established that the subdivision had proceeded during the course of 2010 without further reference to the defendant or the Body Corporate. Spendley stated that at the time of concluding the sale with the plaintiff he had completely forgotten about the approval that had been given in 2007.

[18] Spendley denied that there had ever been a discussion between himself and Thompson relating to the subdivision of section 2. According to him the matter was not raised at all. The correspondence relating to the discovery that section 2 had in fact been subdivided suggests however that the issue had been raised prior to the plaintiff submitting its offer to purchase the property. It is appropriate to quote the full exchange of emails, which commences with an email to Thompson from Attorney Watson on 25 November 2010, which is in the following terms:

> "Dear Joe,
>
> I refer to our meeting earlier today and confirm that, in terms of section 21 of the Sectional Titles Act, the consent of the Trustees of the Body Corporate is required in order for the subdivision of a section to take place.

In the current situation, with the right of *veto* entrenched in favour of the owner of section 1 in the Rules, there is no doubt that the consent of Rob / his partner should have been obtained prior to the drafting of the sectional plan of subdivision.

As soon as I know who the conveyancer is, I will contact him / her and try to obtain a copy of the consent resolution / minute whereby such consent was extensively obtained, and we can then take it from there.

I confirm, however, that the sale was *voetstoots*, that Rob was blissfully unaware of the subdivision, and that this issue legally cannot frustrate the transfer of the property.

I confirm your advices that you will not be paying the balance of the purchase price and the costs to us by tomorrow, as requested, and would like to suggest that you seek legal advice in this regard in the meantime. 'As shocking as this is, and as regretful as Rob is about the situation, he has no intention of allowing the sale to fall through, and will do whatever he can to assist in the resolution of this issue, but will hold you to the conditions of the sale in the meantime.'

We accordingly await payment on the guarantees as requested."

[19] To this the plaintiff replied in the following terms on the same day:

"Dear Tracy,

Thank you for disclosing today the current situation relating to section 2, as you are aware it came as a shock and a surprise.

As you are aware I feel very strongly about this issue which is why I specifically addressed this with the seller prior to making my offer. Could you establish what exactly happened and how it could have happened? Can you also establish how the current situation can be rectified back to the position I was advised was the situation prior to making my offer.

Kind regards

Joe"

[20] Finally, on Friday November 26th 2010, Attorney Watson replied to the aforementioned email in the following terms:

"Dear Joe,

I can understand that you must be shocked and surprised about the subdivision of section 2, as are Rob and I, and I assure you that both Rob and myself will assist you in any way we can to resolve this issue about the subdivision, and take the owners of section 2 to task if there has been any impropriety (which there must have been) but my explicit instructions from Rob are that if the balance of the purchase price and the transfer costs are not paid today, and the guarantees not furnished as per the conditions of sale, he will either:

1. Issue summons for specific performance on Monday, OR
2. Cancel the sale in accordance with clause 15, retain your deposit and sue for any further damages once same are calculated.

> I am still awaiting details of the relevant conveyance from our Cape Town correspondents, and, as discussed yesterday, will contact them as soon as I have those details.
>
> Rob will let me have a copy of those minutes we discussed by lunchtime, but he said that at that meeting they only asked for permission to subdivide the second floor, which Rob declined, at no stage was the subdivision of the whole of section 2 even brought up at a Body Corporate meeting, so that in itself is evidence that the consent of the Body Corporate was never obtained, as required in the Act.
>
> I will let you know as soon as I have more information, but I strongly recommend that you pay the balance purchase price and costs today, as requested, and furnish the guarantees.
>
> Kind regards."

[21] It is common cause between the parties that subsequent enquiries established that a resolution was adopted at a meeting of the Trustees of the Park Towers Sectional Title Scheme on 31 October 2007, in terms of which the Trustees, including Spendley, on behalf of the Body Corporate, adopted a resolution which provides as follows:

> "3. The owner of section 2 in the Sectional Title Scheme, namely Southern Palace Investments 358 (Pty) Limited, reg no. 2006/005379/07, is hereby authorised to apply to the Surveyor General for the subdivision of section 2 (in the Sectional Title Scheme known as Park Towers Sectional Title Scheme, no. SS 150/1984) into approximately 100 sections in accordance with the current approved building plans;
>
> 4. Werner Bellingham in his capacity as Trustee of the Body Corporate be and is hereby authorised to sign all the relevant documents to give effect to this resolution, including but not limited to the registration of the notarial deeds as provided for in terms of section 27 (3) of Act 95 of 1985."

[22] Spendley's evidence was that at the time at which the agreement was concluded with the plaintiff he was not aware that section 2 had been subdivided. Although the subsequent discovery of the resolution authorising same caused him to recall what had occurred, he stated that he had completely forgotten about that resolution at the time that the agreement with the plaintiff was concluded.

[23] Thompson was, in my view, not a particularly good witness inasmuch as he was, throughout his cross-examination, argumentative and prone to making assumptions not warranted in the circumstances. He was also, at times, defensive and disinclined to concede that which was obvious. This aside, I do not consider that his belligerent demeanour rendered his evidence unreliable. There was much of his evidence which was supported by the content of the correspondence which passed between him and Attorney Watson upon the discovery of the fact that section 2 had already been subdivided. Not only does the correspondence record his shock at this discovery (and indeed that of Spendley) it contains the clear assertion made at that time that the issue of the subdivision was pertinently discussed, an assertion which was not placed in dispute by the defendant in correspondence subsequent to that. In this regard reference may be made to a lengthy and detailed letter written by the defendant's attorneys prior to institution of this action. The thrust of the letter, dated 1 December 2010, is that the defendant alleges that the true difficulty is that the plaintiff was not able to raise the necessary finance and that it was seizing upon the subdivision of section 2 as an excuse to avoid its legal obligations. A fact pertinently denied by Thompson in his evidence.

[24] The defendant's letter of 1 December 2010 was in reply to a letter, dated 26 September 2010, from the plaintiff's attorneys. In that letter the plaintiff's attorneys recorded the following:

> "2. To summarise the history of the matter:
>
> 2.1 Our client purchased section 1 Park Towers on the understanding that the Park Towers Scheme was comprised of only two sections.
>
> 2.2 This was represented to our client throughout by the seller.

2.3 Our client communicated the fact that it was not interested in purchasing into a sectional title scheme where our client would effectively acquire a host of unwanted and troublesome 'parties' who would participate and interfere with the management of its investment.

2.4 Your client reassured ours that, in terms of the Rules which were furnished to our client, the owner of section 1 essentially had a right to *veto* subdivision of section 2 and thus our client's worst nightmare would never materialise.

2.5 Our client offered to purchase the property on that basis.

6. In short, our client is not getting the property that it thought it was buying or, for that matter, that your client thought it was selling.

7. Whether this happened by fraud or otherwise is really quite immaterial. The fact remains that the subdivision of section 2 into 110 units has altered the '*merx*' that our client thought it had purchased."

[25] The defendant's response to the plaintiff's contentions is as follows:

"16. We confirm our advices to your client on Thursday, 25 November and again on Friday, 26 November, that our client was not aware that section 2 had been subdivided into 110 sections, and that our client certainly had not consented to such subdivision, as it was required to do in terms of the Sectional Titles Act and the Rules of the Scheme. We are still trying to establish exactly how the subdivision was done without our client's consent, but this has no bearing on the issue. The sale was unconditional. This was the primary reason that it was accepted by our client. Our client accepted a lower offer than it initially wanted because it was happy with the unconditional sale in which your client, as an astute business person, acquainted himself fully with the property being sold. It had rejected an earlier similar offer from your client which was subject to a number of conditions. Here it may be apposite to note that Mr Allen Moor, the estate agent who represented your client when the first offer had been put forward by your client / its sole member, was contacted by your client asking whether he could advise how to find finance for the purchase.

17. This point bears repeating. This was the third occasion on which your client had put in offers to purchase. Two of them had already been rejected. It was only after an unconditional offer to purchase was received that our client was prepared to lower the purchase price. At all stages in the auction and subsequent selling process your client was made aware, through disclaimers, and the contents of the deed of sale for your client to satisfy himself regarding the nature of the *merx* he was purchasing. Since his 'worst nightmare' related to the nature of his neighbour (section 2) one would have thought he would look at the deed of his neighbour and satisfy himself as to the nature thereof, given that he was at risk regarding the nature of the *merx*. A cursory due diligence would have revealed all given that the Deeds Register is open to all especially in this day and age when almost all property practitioners including estate agents and attorneys, have access to the Deeds Register using the internet and standard software. Our client was and is aware that their consent, as owners of section 1, would be required for subdivision of section 2, and given that our client had at no stage given such consent, they were entitled to assume that section 2 could not be subdivided. At no stage did our client represent to your client anything but the facts as he knew them. It was certainly not incumbent on our client to check that section 2 had not been subdivided, when he knew that he had not given consent therefore, and that such subdivision was therefore not legally possible.

> 24. For the reasons above our client formed the impression that your client ceased on this point because he could not raise the necessary finance. Had the issues regarding the nature of unit 2 been as important to it as it now contends, then presumably it would have done a very basic due diligence in this regard. Even a basic glance at the deed would have revealed what had transpired. This is all the more so because your client's member was an astute businessman with many years experience. As it turns out, neither the seller nor the purchaser are in any way prejudiced by what has transpired."

[26] Striking is the absence of any denial that the representations alleged by the plaintiff, were made. As is also the absence of a denial that the question of subdivision of section 2 formed part of the discussions between the parties. It is also apposite to note here that it was common cause that the auction brochure reflects the scheme as comprising of only two sections. It was accordingly not in dispute that the defendant had, prior to the conclusion of the agreement of sale, represented that the scheme comprised of two units.

[27] I accept that, having regard to the plaintiff's evidence and the content of the subsequent exchange of correspondence, that the plaintiff did indeed raise as a matter of concern the question of subdivision of section 2. I further accept that it was represented to the plaintiff that the owner of section 1 enjoyed a right of *veto* on a proposed subdivision of section 2, as provided for in the Rules of the Scheme. To the extent that Spendley's evidence was to the contrary, I do not accept it.

[28] This is not to suggest that Spendley's evidence as a whole stands to be rejected. In my view Spendley was not a dishonest witness. According to him he had had very limited interaction with Thompson. The issue as to the subdivision of section 2 was, in his view, unimportant precisely because the Rules of the Scheme did not allow such subdivision without the consent of the owner of section 1. He stated clearly that, at the time of the conclusion of the sale agreement, he was not

aware that section 2 had been subdivided. When this was discovered he was surprised and shocked. This much is borne out by the correspondence. He did not know it had occurred and only recalled when the resolution of October 2007 was brought to light.

[29] In my view it must be accepted that the fact of the subdivision was unknown to Spendley at the time of concluding the agreement of sale with the plaintiff. Spendley said that he had forgotten about the authorisation which had been given. It was suggested that this is unreasonable inasmuch as it is difficult to conceive how such an important event which pertinently related to the plaintiff's concerns could have been forgotten. I disagree. Spendley explained that since it had occurred in 2007 and had related to a proposal by Southern Palace Investments, prior to its liquidation, he had considered that the intervening liquidation would have brought that to an end. Since he had heard nothing further about the matter he had simply forgotten about it thereafter.

[30] The plaintiff bears the onus to prove that Spendley acted fraudulently or that he knowingly failed to disclose a material fact to the plaintiff. It was argued that, on the plaintiff's own version, a fraudulent misrepresentation is not established on the basis that the alleged misrepresentation went no further than that the Rules of the Scheme effectively reserved the owner of section 1 a right of *veto* in respect of the proposed subdivision of section 2.

[31] In the light of the fact that Spendley had no knowledge of the fact that section 2 had been subdivided at the time that the agreement of sale was concluded, it must

be accepted that the defendant's representation in regard to the two units comprising the scheme and the existence of an effective right of *veto* in respect of a proposed subdivision was without knowledge of the true facts and accordingly cannot be an intentional misrepresentation.

[32] In the circumstances there is no scope for a finding that the plaintiff has established the requisites of a fraudulent misrepresentation upon which its case, in the main, is based.

[33] That leaves the alternative basis upon which the plaintiff seeks to avoid the bargain, namely that the plaintiff was induced into a unilateral mistake in concluding the agreement by reason of the defendant's failure to draw to the plaintiff's attention the existence of the resolution authorising the subdivision of section 2. In this regard it was contended that the plaintiff had entered into the agreement under the mistaken belief that it was purchasing section 1 with a right of *veto* to a possible subdivision of section 2, since section 2 had not then been subdivided.

[34] As indicated, it was common cause that section 2 had been subdivided and that this had, as a matter of fact, rendered the right of *veto* provided for by the Scheme Rules, nugatory.

[35] The plaintiff's alternative claim was pleaded, and argued, on the basis that in entering into the agreement plaintiff was under the reasonable but mistaken belief that it was purchasing the property and the existing effective right as owner of the property to *veto* a proposed subdivision of section 2. This unilateral mistake as to

the *merx* was, so it was argued, induced by the defendant's misrepresentation, alternatively its failure to disclose the true facts to the plaintiff.

[36] In *George v Fairmead (Pty) Limited* 1958 (2) SA 465 (A) Fagan CJ stated (at 471) that:

> "When can an error be said to be j*ustus* for the purpose of entitling a man to repudiate his apparent consent to a contractual term? As I read the decisions, our courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? (v*ide Logan v Beit,* 7 S.C. 197; *I. Pieters & Company v Salomon*, 1911 A.D. 121 esp. at pp. 130, 137; v*an Ryn Wine & Spirit Company v Chandos Bar.* 1928 T.P.D. 417,esp. at pp. 422, 423, 424; *Hodgson Bros. v South African Railways,* 1928 C.P.D. 257 at p. 261). <u>If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound</u>."
>
> (Emphasis added).

[37] Similarly in *National and Overseas Distributors Corporation (Pty) Limited v Potato Board* 1958 (2) SA 473 (A) it was held that:

> "Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope of a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (*error*) would have to be reasonable (j*ustus*) and it would have to be pleaded."

[38] As noted by Christie, *The Law of Contract in South Africa* (6th Ed) at 329, "...unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable person ought to have known it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge."

[39] In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) Harms AJA (as he then was) said (at 239 I – 240 B):

> "In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? Compare Corbin on *Contracts* (1 volume edition) (1952) at 157. To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party mislead thereby?
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> See also *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) at 906 C to G; *Spindrifter (Pty) Ltd v Lester Donovon (Pty) Ltd* 1986 (1) SA 303 (A) at 316 I – 317 B.
>
> The last question postulates two possibilities: Was he actually mislead and would a reasonable man have been mislead?"

[40] I have already found that the defendant did represent that the Scheme comprised two sections and that the Rules entitle the owner of section 1 to *veto* a proposed subdivision of section 2. This induced the plaintiff to believe that no subdivision of section 2 had yet occurred and that it would be entitled to exercise its rights as contained in Rule 27 of the Scheme Rules. In this belief it was mistaken. Plaintiff accordingly laboured under the mistaken belief that it was purchasing section 1 together with an effective right in its favour in terms of the Scheme Rules.

[41] As indicated, the misrepresentation by the defendant was not fraudulent. Although it was argued that it must be held to have been negligent inasmuch as Spendley must have known that permission had previously been granted to Southern Palace Investments to subdivide section 2, I am unable to agree. Spendley explained that he had forgotten about the approval that had been given to Southern Palace Investments. He explained that the approval was given for a

particular purpose and at a stage prior to the liquidation of Southern Palace Investments. Following the liquidation of Southern Palace Investments the new owner of the section had at no stage informed him or the defendant that it was proceeding with the subdivision. On this basis he had assumed that nothing had come of it and that it accordingly had slipped his mind. In my view there is no basis not to accept this version. Certainly his conduct, as evidenced by the correspondence between the parties when the issue first arose, is consistent with his explanation that he had forgotten about the matter and that he believed that the subdivision which had been undertaken was irregularly done. I accept therefore that Spendley's misrepresentation as to the true state of affairs was based upon a lack of knowledge of those facts and is, properly considered, an innocent misrepresentation.

[42] The fact that the mistake upon which the plaintiff relies was induced by an innocent misrepresentation does not disentitle it to avoid the agreement. It was however suggested in argument that regard be had to the effect of the exemption clause relating to representations made, as contained in the agreement concluded between the parties. In *Trollip v Jordaan* 1961 (1) SA 238 (A) it was held by the majority that a mistaken party is precluded from rescinding an agreement on the basis of a unilateral mistake induced by the other party's innocent misrepresentation in circumstances where the contract contained an exemption clause to the effect that the parties acknowledged that no representations had been made in the course of entering into the contract. In that matter however, decided upon exception, the mistake was found not to be a fundamental mistake. The minority came to a different conclusion on the facts. In dealing with a similar circumstance, Flemming J in *Janowski v Fourie* 1978 (3) SA 16 (O) came to the conclusion that different

considerations apply in circumstances where the effect of a misrepresentation inducing a unilateral mistake was that there was in effect no consensus ("geen wilsooreenstemming") between the parties. In this regard the learned judge said (at 20 D):

> "In verband met dwaling met betrekking tot wilsooreenstemming, is geen toepaslike gesag aangevoor waar volgens vanwoorstelling a party alleen van hulp is indien dit bedrieglik gemaak is nie. Daar is inteendeel wel gesag wat daarop dui dat 'n party op die afwesigheid van wilsooreenstemming kan steen ondanks 'n skuinbare toestemming (selfs waar dit blyk uit ondertekening van 'n skriftelike stuk) waar hy daartoe gelui is deur 'n vanwoorstelling wat nie op bedrieglike wyse gemaak is nie."

See also *Allen v Sixteen Stirling Investments (Pty) Limited* 1974 (4) SA 164 (D) and *Maresky v Morkel* 1994 (1) SA 249 (C).

[43] This is such a case where the plaintiff contends that the mistake as to the true nature of the *merx* was such that no consensus was established in concluding the agreement between the parties. This lack of consensus arose consequent upon the misrepresentation made by the defendant. I accept that this is so. Consequently the exemption clause contained in the agreement cannot avail the defendant. It is apparent that both plaintiff and defendant laboured under a mistaken belief as to the existence of an extant right of *veto*. Plaintiff's mistake was induced by the honest though mistaken belief held by Spendley that the right of *veto* was extant and section 2 had not been subdivided which he represented to be the case. In these circumstances the parties were mutually mistaken as to the true nature of the *merx* and accordingly it cannot be said that the parties achieved consensus as to the subject matter of the sale.

[44] In my view, based upon the facts as established at trial the plaintiff is entitled, as a matter of law, to avoid the contract. In the circumstances the plaintiff's claim succeeds. I make the following order:

(a) The agreement of sale concluded between the plaintiff and defendant in respect of section 1 Park Towers and dated 8 October 2010 is void for lack of consensus;

(b) The defendant is directed to pay to the plaintiff the sum of R788,157.89 together with interest thereon at the legal rate of 15% per annum *a tempore morae* to date of payment;

(c) The defendant is ordered to pay the plaintiff's costs of suit.

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GG GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE PLAINTIFF:	Mr R Van Rooyen SC, instructed by Friedman Scheckter
FOR THE DEFENDANT:	Mr A Beyleveld SC, instructed by De Villiers & Partners